## TABLE OF CONTENTS


| | Page |
|---|---|
| MOTION FOR LEAVE TO FILE STATEMENT AMICUS CURIAE | 1 |
| STATEMENT | 2 |
| I. Statement of Interest | 2 |
| II. Federal Courts Have No Subject Matter Jurisdiction Over Indian Tribal Membership Questions | 3 |
| III. Conclusion | 6 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| **Statutes and Treaties:** | |
| 25 U.S.C. § 163 | 3 |
| 25 U.S.C. § 1071 | 4 |
| 25 U.S.C. § 1301-03 | 2 |
| Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians (August, 1864) | 2 |
| **Executive Orders:** | |
| Executive Order of June 23, 1876 (1 Kappler 815) | 2 |
| **Cases:** | |
| *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir. 1973) | 2, 3, 6 |
| *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) | 3 |
| *Short* v. *United States*, 486 F.2d 561 (Ct. Cl. 1973) | 3 |
| *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir. 1973) | 2, 3, 6 |
| **Miscellaneous:** | |
| Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. Legis, 557 (1972) | 5 |
| Opinion of the Solicitor of the Department of Interior (December 18, 1937) | 4 |
| Powers of Indian Tribes, 55 I.D. 14 (1934) | 3 |
| U.S. Department of Interior, *Federal Indian Law* (1958) | 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1281

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MEL TONASKET, *et al.*,
*Petitioners,*

v.

ALICE M. THOMPSON,
*Respondent.*

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NARCISSE NICHOLSON, JR., *et al.*,
*Petitioners,*

v.

JUNE KAREN LARAMIE, *et al.*,
*Respondents.*

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**MOTION OF THE HOOPA VALLEY TRIBE OF INDIANS, FOR LEAVE TO FILE STATEMENT AMICUS CURIAE IN SUPPORT OF PETITION OF MEL TONASKET, et al., and NARCISSE NICHOLSON, JR., et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

The Hoopa Valley Tribe of Indians respectfully moves for leave to file, as amicus curiae, the accompanying statement in support of the petition of Mel Tonasket, et al., and Narcisse Nicholson, Jr., et al., (No. 73-1281, filed February 20, 1974), for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

The Hoopa Valley Tribe states, in support of this motion, that the decisions of the United States Court of Appeals for the Ninth Circuit in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir. 1973) and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir. 1973) are erroneous in holding that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-3 vests federal courts with jurisdiction to determine questions of tribal membership. The holdings are contrary to the spirit and intent of the Indian Civil Rights Act of 1968, and would destroy the entire sovereign right of the Indian tribes to determine their own membership.

In the interest of justice, the Hoopa Valley Tribe of Indians respectfully requests that the Court grant this motion.

## STATEMENT OF THE HOOPA VALLEY TRIBE OF INDIANS IN SUPPORT OF PETITION OF MEL TONASKET, et al., and NARCISSE NICHOLSON, JR., et al., FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

### I.

### STATEMENT OF INTEREST

The Hoopa Valley Tribe of Indians resides on the Hoopa Valley Reservation, California, pursuant to the "Treaty of peace and friendship between the United States government and the Hoopa, South Fork, Redwood, and Grouse Creek Indians," executed in 1864, and the Executive Order of June 23, 1876, (1 Kapp. 815).

The Hoopa Valley Tribe is organized under a Constitution and By-Laws, duly approved by the Secretary of the Interior. Article IV of the Tribal Constitution prescribes rules and regulations governing future membership in the Hoopa Valley Tribe, subject to the approval of the Secretary of the Interior.

The power of the Tribe to determine enrollment upon the Hoopa Valley Reservation with the approval of the Secretary of the Interior has been challenged in *Short* v. *United States*, 486 F.2d 561 (Ct. Cl. 1973). Your amicus petitioned this Court for a writ of certiorari (*Hoopa Valley Tribe* v. *Short*, No. 73-1104) to review the aforementioned decision of the Court of Claims on January 14, 1974.

The decisions of the United States Court of Appeals for the Ninth Circuit in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir., 1973) and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir., 1973) bear directly upon the resolution of questions of tribal membership which are presented in *Short* v. *United States*, *supra*.

## II.

## FEDERAL COURTS HAVE NO SUBJECT MATTER JURISDICTION OVER INDIAN TRIBAL MEMBERSHIP QUESTIONS

In *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), this Court held that termination of tribal membership is a political matter "not subject to be controlled by the judicial department of the government" [187 U.S. at 565]. But in sharp contrast, Congress has plenary power to regulate tribal enrollment. *Powers of Indian Tribes*, 55 I.D. 14, 33 (1934).

Consistent with its plenary authority, Congress has enacted 25 U.S.C. § 163 which delegates to the Secretary

of the Interior general authority to approve final tribal rolls for purposes of dividing and distributing tribal funds. With respect to the Colville Confederated Tribes, Congress has gone even further through 25 U.S.C. § 1071 which limits per capita payments by the Tribes "to each enrolled member of the Confederated Tribes of the Colville Reservation."

Determination of the tribal roll itself has been left to the Colville Confederated Tribes through Section 2 of Amendment III of the Tribal Constitution, but federal sanction of the tribal roll occurs through re-delegation of the Secretary's supervisory power down to the level of Superintendent of the Colville Indian Agency.

This Secretarial authority to approve tribal rolls does not give the Secretary the power to place onto the membership roll persons who have been denied membership by the tribe under provisions of the tribal constitution:

> Whatever may be the exact extent of departmental power in this field, in view of the broad provisions of the Wheeler-Howard Act it has been administratively held that the Secretary of the Interior may define and confine his power of supervision in accordance with the terms of a constitution adopted by the tribe itself and approved by him. [U. S. Department of Interior, *Federal Indian Law*, 421 (1958)]

Thus the Secretary is empowered to review the roll to assure that a tribe has followed its own constitutional procedures in placing someone on its membership lists but cannot act on his own to force the tribe to accept a new member.

This restriction on review of tribal roll determinations is supported by an Opinion of the Solicitor of the Department of Interior, December 18, 1937:

> . . . while the Department may approve or disapprove adoptions into the tribe and expulsion therefrom made by the tribal authorities, no case holds that the Department, in the absence of express statutory authorization, may grant a person tribal membership over the protest of the tribal authorities.

The underlying concept of the Indian Reorganization Act of 1934 was that tribes should be able to carry out the functions of a government and to utilize fully their sovereign powers. The approval of tribal constitutions and ordinances by the Secretary of the Interior provides any governmental supervision that might be necessary in carrying out these functions. Inserting the court as supervisor over tribal enrollment functions is a usurpation of legislative and tribal power that is of potentially enormous significance to the administration of Indian affairs.

The legislative history of the Indian Civil Rights Act of 1968 reflects a change from an approach of imposing on Indian tribes the full Constitutional limitations applicable to the federal and state governments to an approach of extending certain specified protections on a limited basis to persons who become subject to tribal governmental action. As stated in Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. Legis. 557, 617 (1972):

> For the federal courts, the practical meaning of this accommodation is that title II requires a limited construction which takes an informed account of its development. It does not authorize the court to apply broadly such elusive and expanding concepts as due process, equal protection, or unreasonable search and seizure without a sensitive regard for their impact on tribal structures and values. Because this point is fully revealed only by tracing seven years of legislative history, there is a danger that it may be missed and that an unlimited construction of title

II will exacerbate the tribes' difficulties adjusting to its requirements.

## III.

## CONCLUSION

The question of whether a federal court has jurisdiction over determinations of tribal membership made by the tribe in the exercise of its internal sovereign rights is one of great importance for intertribal and intratribal relations, and is therefore appropriate for Supreme Court review.

The Hoopa Valley Tribe of Indians respectfully requests that the petition of Mel Tonasket, et al. and Narcisse Nicholson, Jr., et al. for writs of certiorari to the United States Court of Appeals for the Ninth Circuit be granted, and that the Court of Appeal's decisions in *Thompson* v. *Tonasket*, 487 F.2d 316 (9th Cir. 1973), and *Laramie* v. *Nicholson*, 487 F.2d 315 (9th Cir. 1973), be reversed.

Respectfully submitted,

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